

IN THE MATTER OF	:	BEFORE THE
DONALD REUWER	:	HOWARD COUNTY
T/A	:	
ELLICOTT CITY	:	BOARD OF APPEALS
LAND HOLDING, INC.	:	HEARING EXAMINER

Petitioner	Section 131.I.3.c Request to Extend Time Limits For Building Permits to Establish Conditional Use Granted in BA Case No. 05-006C, As Modified by BA 07-0010C, Hearthstone of Ellicott Mills II
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DECISION AND ORDER

On September 17, 2007, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard oral argument in an evidentiary hearing¹ concerning a written request by Ellicott City Land Holding, Inc. (the "Petitioner"), to extend the two-year time limit to obtain all building permits required to establish the conditional use approved in Howard County Board of Appeals Case No. BA 05-06C, as modified by BA 07-010-C, pursuant to Section 131.I.3.c of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that copies of the requested time extension were sent by certified mail to adjoining property owners and persons who testified in BA 05-06C and BA 07-010C.

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Donald Reuwer, the owner of the subject property, and Joseph Rutter, of Land Design and Development, Inc., testified to the Petitioner's efforts in establishing the conditional use.

¹ Section 131.13.c(3) provides for a "work session" when oral argument is requested. In response to the undersigned's request to the County Solicitor to clarify the meaning and intent of the phrase "work session" the Solicitor's office replied by electronic correspondence dated September 12, 2007, that the most reasonable interpretation would be to equate a "work session" with a hearing and require all the protections of due process be accorded in that proceeding, including recording testimony under oath with the right of cross-examination. This letter was read into the record.

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Donna Mennitto spoke at the hearing, although not specifically in opposition to or in favor of the request.

Background

The subject property, 8440 and 8460 Grove Angle Road, is located in the 2nd Election District north and west of Grove Angle Road's terminus, approximately 600 feet north of West Grove Road in Ellicott City (the "Property"). The Property is referenced on Tax Map 31, Grid 7 as Parcels 20 and 36.

The August 18, 2005 Decision and Order issued in BA Case No. 05-006C granted the Petitioner a conditional use for an Age-restricted Adult Housing development with 50 single-family attached units, each with 2,700 square feet of living space, to be located in an R-20 (Residential: Single) zoning district (Hearthstone of Ellicott Mills II). On July 13, 2007, the Hearing Authority issued a Decision and Order in BA Case No. 07-010C, which granted the petition of Ellicott City Land Holding, Inc., to modify the conditions of approval in BA 05-006C. The approved modifications included increasing the number of units from 50 to 60 (ten additional units), decreasing unit size (from 2,700 square feet of living space to 1,680 square feet), and increasing the size of the community building (from 1,000 to 1,200 square feet).

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts.

1. The operative date for tolling Section 131.13.a's requirement that the conditional use be established by obtaining building permits within two years is August 18, 2005, the issuance date of the BA 05-006C Decision and Order.

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2. By letter dated July 9, 2007 (the "Extension Request Letter"), the Petitioner requested a two-year extension of the two-year time limit to establish the conditional use.

3. As required by Section 131.13.c(2) of the Zoning Regulations, the Petitioner sent by certified mail copies of the Extension Request Letter to adjoining property owners and persons who testified in BA 05-06C and BA 07-010C.

4. By letter dated July 23, 2007, Ms. Donna Mennitto, who testified at the BA 05-06C and BA 07-010C hearings, requested oral argument on the time extension request as permitted by Section 131.13(c).

5. The Extension Request Letter stated, and the Petitioner testified to, the following actions to establish the conditional use.

- i. The Petitioner submitted a Site Development Plan ("SDP") to the Department of Planning and Zoning ("DPZ") on September 7, 2005.
- ii. DPZ comments on the SDP were due on October 6, 2005.
- iii. DPZ commented on the SDP on October 25, 2005.
- iv. A revised SDP was submitted to DPZ on December 2, 2005.
- v. DPZ's comments on the revisions were sent to the Petitioner on January 11, 2006.
- vi. Further SDP revisions were submitted to DPZ on February 25, 2006.
- vii. DPZ commented on the revisions on April 6, 2006.
- viii. Revised SDP plans were submitted to DPZ on May 18, 2006.
- ix. Water and Sewer drawings were approved on June 20, 2006.
- x. DPZ's comments on the SDP revisions were sent to the Petitioner on April 30, 2006.

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- xi. Subsequent meetings between the Petitioner and DPZ/county agencies resolved comments and DPZ issued a technically complete determination by letter dated August 8, 2006.
 - xii. DPZ requested the Petitioner to respond to additional issues on August 18, 2006.
 - xiii. The Petitioner submitted a new revised plan letter to DPZ on September 1, 2006.
 - xiv. DPZ's additional comments on the revised plan were sent to the Petitioner on September 15, 2006.
 - xv. The Petitioner submitted direct revised plans to DPZ on September 20, 2006, November 16, 2006, and December 7, 2006.
 - xvi. DPZ sent new revised comments to the Petitioner on December 12, 2006.
 - xvii. The Petitioner submitted a plat and SDP originals to DPZ on January 1, 2007.
 - xviii. The Petitioner responded to new comments on February 8, 2007.
 - xix. Developer Agreements were executed on February 8, 2007.
 - xx. DPZ approved the SDP on May 25, 2007.
6. Final subdivision plans and required environmental permits were processed concurrently with the SDP.
7. The Extension Request Letter stated, and the Petitioner testified, that a revised SDP reflecting the modifications approved in BA 07-010C was being prepared for submission to DPZ.
8. The Petitioner testified that there has been no change to vicinal properties since the original petition was granted.

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9. Ms. Mennitto testified that she requested oral argument to learn about the process and to raise an issue about the May 25, 2007 SDP. She stated that this SDP showed Grove Angle Road as the sole, legal, and primary access, contrary to the Hearing Authority's conclusion in the original BA 05-006C Decision and Order that the use of Water Grove Road as an alternate means of access would militate against potential adverse traffic impacts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. Lapse of Decision Approving a Conditional Use (Section 131.I. 3)

Under Section 131.I.3, a Decision and Order approving a conditional use becomes void unless a building permit conforming to the plans for which the approval was granted is obtained within two years. Section 131.I.3.c(4) authorizes the Hearing Authority to grant the request if it finds that establishment of the use in accordance with the approved conditional use plan has been diligently pursued. If oral argument is presented on the request, the Hearing Authority may deny the request if any of the oral arguments allege changes have taken place in the circumstances which led to the original decision to approve the conditional use. Additionally, Section 131.I.3(c) authorizes the Hearing Authority to grant up to two extensions of this time limit, not to exceed three years each.² Such extensions may be granted if the property owner, prior to the expiration of the conditional use approval, explains in detail the steps that have been taken to establish the use.

In this case, there is no dispute that the controlling date for establishing the conditional use is August 18, 2005. The Petitioner submitted the Extension Letter Request to the Hearing

² The Zoning Regulations also provide for the possibility of third extension when, as here, a previously granted conditional use has been previously modified. Section 131.I.3.e.

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Authority in a timely manner, on July 9, 2007, some 40 days before the August 19, 2007 two-year establishment of use deadline.

The Extension Letter Request and the Petitioner's testimony clearly show the Petitioner diligently pursued establishing the conditional use, having spent 22 months preparing and revising the original SDP, which DPZ approved. The Petitioner also submitted and the County processed the final subdivision plans and required environmental permits concurrently with the SDP.

III. The Oral Argument Argument

The gist of Ms. Mennitto's oral argument is that the May 25, 2007 SDP shows Grove Angle Road as the sole, legal means of access to Hearthstone II. She avers this condition conflicts with the original BA 05-006C Decision and Order, which concludes in part that the use of Water Grove Road as an alternate means of access would militate against potential adverse traffic impacts. She spoke of conversations with DPZ's director, Ms. Marsha McLaughlin, who apparently told her this would be corrected on the revised SDP (which as of this hearing has not been submitted).

Mr. Rutter explained that only a public road could be shown as the primary and legal means of access to a subdivision, which explains the identification of Grove Angle Road, a county road, as the legal means of access.

In response to Ms. Mennitto's concerns, the Petitioner agreed that a note would be placed on the revised SDP plan identifying Water Grove Road as an access road.

At issue here is the meaning of the phrase "the circumstances which led to the original decision to approve the conditional use." Although I stated at the hearing that "circumstances"

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means a change in the physical environment (a change in vicinal properties), the exchange between Ms. Mennitto, the Petitioner, and myself at the hearing convinces me that the phrase is ambiguous, not unlike the phrase "work session."³ If the words of a provision are ambiguous, i.e., "reasonably capable of more than one meaning" – that is, their meaning is intrinsically unclear or their application to a particular object or circumstance is uncertain – then resort may be made to the statutory framework. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514 (2003).

When it comes to a request to extend the time to establish an approved conditional use, what is the ordinary and natural meaning of "the circumstances which led to the original decision to approve the conditional use?" The word "circumstances" is defined as:

1 a : a condition, fact, or event accompanying, conditioning, or determining another : an essential or inevitable concomitant <the weather is a *circumstance* to be taken into consideration> **b** : a subordinate or accessory fact or detail <cost is a minor *circumstance* in this case> **c** : a piece of evidence that indicates the probability or improbability of an event (as a crime) <the *circumstance* of the missing weapon told against him> <the *circumstances* suggest murder>

See Merriam-Webster On-Line Dictionary, <http://www.m-w.com/dictionary/seek>. These definitions variously explain "circumstances" as a fact, condition, or evidentiary matter that determines something else. Applying this definition to Section 131.3, which concerns the lapse of a decision approving a conditional use, "the circumstances which led to the original decision to approve the conditional use" includes the Hearing Authority's factual and legal determinations

³ This is apparently the first time oral argument was requested in relation to an extension request. I also note here that the County Solicitor's response to my request for an interpretation of the phrase "work session" stated that Section 131.3.c(3) "is problematic and probably should be re-done." In my view Section 131.3c(4) is equally problematic.

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leading to its decision to grant the original decision and order. As Ms. Mennitto testified, one of these determinations was the Hearing Authority's conclusion in the original decision and order that the use of Water Grove Road as an alternate means of access would militate against potential traffic issues.

CONCLUSION

The Petitioner has clearly established it has diligently pursued establishing the conditional use. I therefore conclude the Petitioner should be granted a two-year extension to establish the conditional use in this case.

The evidence before also convinces me that changes have taken place in the circumstances which led to the original decision to approve the conditional use.⁴ However, these changes do not warrant a denial of the requested extension because the Petitioner has agreed to place a note on the revised SDP plan identifying Water Grove Road as an access road to Hearthstone II.

⁴ Although at the hearing, I stated the access issue should have been raised at the previous hearing on the Petitioner's request to modify unit number and size. However, Section 131.3 clearly states that the circumstances to be considered are those relating to the *original* decision, not any later decision

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ORDER

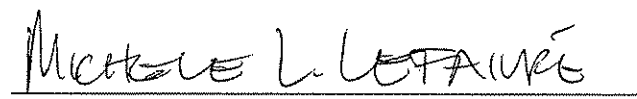
Based upon the foregoing, it is this 8th day of October 2007 by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the request of Ellicott City Land Holding, Inc., to extend by two years the time to obtain all building permits to establish the conditional use approved in Board of Appeals Decision and Order No. 05-006C, as Modified by Board of Appeals Decision and Order No. BA 07-010C, is hereby **GRANTED**.

Provided, however, that:

1. A note shall be placed on the revised SDP identifying Water Grove Road as an alternate means of access to Hearthstone II.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed: 10/10/07

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.